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In the Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE NOBLE, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Merit Systems Protection Board had jurisdiction to consider petitioner's claim that the Tennessee Valley Authority failed to honor his veterans' reemployment preference.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-14a) is reported at 892 F.2d 1013. The opinion of the panel of the court of appeals (Pet. App. 16a-23a) is reported at 876 F.2d 1580. The decision and order of the Merit Systems Protection Board (Pet. App. 27a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered December 20, 1989. The petition for a writ of certiorari was filed March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner worked as a cement mason for the Tennessee Valley Authority (TVA) from 1972 to 1985.[1] His hourly position at the Bellefonte Nuclear Plant was, like all TVA positions, part of the "excepted service"—that is, he was appointed without having to take any of the civil service examinations that govern appointments to "competitive service" jobs.[2] Petitioner's position was terminated July 31, 1985, due to a reduction in force (RIF). Gov't C.A. Br. Add. 30. Nineteen of the 21 cement masons in petitioner's competitive level lost their jobs with TVA due to the RIF. Pet. App. 29a.

TVA generally used a "call-by-name" system to fill vacancies for hourly positions. Under that system, management would request the personnel office to hire specific candidates based on their qualifications. TVA's personnel office would then check its records to determine if former employees with reemployment rights or candidates with veterans' preferences should be hired before the individual selected by management. Under TVA's employment policy, TVA would not recognize a veterans' preference when filling vacancies unless a veteran notified TVA's personnel office that he intended to exercise his preference. Gov't C.A. Br. Add. 39. Once the personnel office determined who should be appointed, it would contact the appropriate union to request that the chosen candidate report to work. *Id.* at 42.

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[1] TVA is a government corporation, see 16 U.S.C. 831, 831r, and therefore is considered an executive agency for purposes of the civil service laws, 5 U.S.C. 105.

[2] The Federal Circuit has held that TVA employees are exempted from the competitive service by 16 U.S.C. 831b. See *Dodd* v. *TVA*, 770 F.2d 1038, 1040 (Fed. Cir. 1985).

Petitioner was a "preference eligible" veteran at the time of the RIF, see 5 U.S.C. 2108(3), but did not fill out the forms necessary to exercise his preference until October 7, 1985 (Gov't C.A. Br. Add. 42). Consequently, the Bellefonte personnel office approved management's selection of a nonpreference eligible candidate for a cement mason position and hired him on October 2, 1985. *Id.* at 41, 46. On October 3, management requested that a second nonpreference eligible candidate be hired to fill a cement mason position. *Id.* at 34, 41, 47. The personnel office contacted the appropriate union on or about October 5, and the selected candidate received an official appointment on October 8. *Id.* at 34-35, 48. Because the candidate for the second cement mason position had already been contacted when petitioner exercised his veterans' preference on October 7, petitioner was not given a preference for that job. *Id.* at 42. Petitioner's preference was recognized, however, when subsequent jobs became available, and petitioner worked at Bellefonte on four different occasions between October 1985 and May 1988. Pet. App. 30a-31a.

2. In February 1986, petitioner filed an Equal Employment Opportunity complaint with TVA claiming that he had been discriminated against on the basis of race and age when he was separated by the RIF on July 31, 1985, and when TVA failed to rehire him in October 1985. On February 10, 1988, after a hearing before an EEOC examiner, TVA entered a final decision rejecting petitioner's claims. Gov't C.A. Br. Add. 9-18.

Petitioner sought review of TVA's decision before the Merit Systems Protection Board (MSPB). Petitioner also alleged, for the first time, that TVA's failure to rehire him in October 1985 violated his rights under the Veterans' Preference Act of 1944 (VPA), ch. 287, 58 Stat. 387 (codified as amended at 5 U.S.C. 1302, 2108, 3305(b),

3308-3318, 3320, 3363, 3501-3504, 7511-7514, 7701). Without specifically addressing its jurisdiction over petitioner's VPA challenge, the MSPB held that it did not have jurisdiction to consider any reemployment claims by excepted service members. Gov't C.A. Br. Add. 56. Accordingly, the MSPB limited its review to the *bona fides* of the RIF. Pet. App. 28a. Based on the evidence presented at a hearing, the MSPB rejected petitioner's contention that the RIF was discriminatory or otherwise invalid, holding that TVA decided to reduce its work force solely because of the lack of work at the Bellefonte plant. *Id.* at 32a.

3. On appeal to the United States Court of Appeals for the Federal Circuit, petitioner waived all claims except his contention that TVA violated his rights under the VPA when it rehired two nonveterans in early October 1985. Pet. App. 2a. A unanimous panel of the court held that petitioner had stated a claim under the VPA and that the MSPB had jurisdiction to consider that claim. Because the MSPB had not addressed the merits of petitioner's challenge to TVA's hiring of the two non veterans, the court remanded the case to the MSPB for further proceedings. Pet. App. 22a.

The court of appeals then granted TVA's petition for rehearing en banc, and on rehearing, concluded that the MSPB did not have subject matter jurisdiction to consider petitioner's VPA claim. While acknowledging that TVA is required to honor the reemployment rights of preference eligible veterans, the court explained that petitioner could only take a claim for enforcement of those rights to the MSPB if jurisdiction to hear such a claim had been "granted to [the MSPB] by 'law, rule, or regulation.' " Pet. App. 3a (quoting 5 U.S.C. 7701(a)). Since the court found no such law, rule, or regulation, the appeal was dismissed.

Judge Bennett, joined by Judges Friedman and Newman, dissented. Judge Bennett argued that Congress

intended to provide administrative and judicial review of an agency's failure to reemploy a preference eligible veteran of petitioner's status. Although Judge Bennett could not point to any statute or regulation that directly authorized MSPB review of such actions, he asserted that "Congress is presumed to have intended judicial review of agency actions unless there is persuasive reason to believe otherwise." Pet. App. 13a. "[I]n the present case," Judge Bennett argued, "there is no implicit or overt manifestation of congressional opposition to review." *Ibid.*

ARGUMENT

Petitioner renews his contention that the MSPB had jurisdiction to address his claim that TVA violated his veterans' preference by failing to hire him when positions for which he was qualified became available in October 1985. The jurisdiction of the MSPB is set forth in the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, which provides, in pertinent part, that "[a]n employee * * * may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. 7701(a). The court of appeals properly determined that there is no "law, rule, or regulation" entitling petitioner to bring his claim to the MSPB. Consequently, no question is presented that warrants this Court's review.

1. Petitioner is a preference eligible veteran under the VPA. 5 U.S.C. 2108(3). Following the RIF, he was entitled to be considered for reemployment before nonpreference eligible candidates once he notified TVA that he intended to exercise his veterans' preference. 5 U.S.C. 3315, 3316, 3320; Gov't C.A. Br. Add. 39, 42. However, no law, rule, or regulation authorizes a preference eligible member of the excepted service, such as petitioner, to seek MSPB

review of his claim that an agency has not honored his reemployment priority rights. Consequently, the MSPB did not have jurisdiction to consider petitioner's claim. 5 U.S.C. 7701(a).[3]

In addition to his reliance on Section 7701(a), petitioner contends (Pet. 5) that his claim may be heard by the MSPB pursuant to 5 C.F.R. 351.901, which provides that "[a]n employee who has been furloughed for more than 30 days, separated, or demoted by a reduction in force action may appeal to the Merit Systems Protection Board." Apparently, petitioner believes that this regulation gives an employee adversely affected by a RIF the right to challenge an agency's failure to rehire him. That reading of Section 351.901 is wide of the mark. Part 351 of Title 5 of the Code of Federal Regulations authorizes agencies to reduce the size of their work force when there is a "surplus of employees," 5 C.F.R. 351.201(a), and deals only with the order in which competing employees shall be *retained.* The employment retention rights set forth in those regulations are entirely separate and distinct from the *reemployment* right claimed by petitioner.[4] Indeed, the distinction between retention and reemployment rights has been recognized in statutes, compare 5 U.S.C. 3501-3504 with 5 U.S.C. 3315, 3581-3584, 3597; in regulations, compare 5 C.F.R. Pt. 351 with 5 C.F.R. Pt. 352; and in a decision of this Court, see *Elder* v. *Brannan,* 341 U.S. 277, 286-289 (1951) (holding that reemployment rights under the VPA are not measured by referring to "retention-preference" regulations). Thus, as the court of appeals correctly held

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[3] See *Lackhouse* v. *MSPB,* 773 F.2d 313, 315 (Fed. Cir. 1985), cert. denied, 475 U.S. 1049 (1986); *Rose* v. *Department of Health and Human Servs.,* 721 F.2d 355, 356 (Fed. Cir. 1983).

[4] For the same reason, 5 C.F.R. 351.202(a)(1), also relied on by petitioner (Pet. 5), is of no help to him.

(Pet. App. 4a n.1), 5 C.F.R. 351.901 provides the basis for an appeal to the MSPB only for claims that an agency violated an employee's retention priority rights. It does not provide "an avenue by which [petitioner] may appeal to the MSPB based on an alleged violation of his VPA reemployment rights." Pet. App. 4a n.1.

Other regulations establish the legal basis for an appeal to the MSPB to vindicate reemployment rights, but none of those provisions applies to a person in petitioner's position. Section 330.209 of Title 5 of the Code of Federal Regulations provides that "[a]n individual who believes that his or her reemployment priority rights under this subpart have been violated * * * may appeal to the [MSPB]." But Pt. 330 applies only to members of the competitive service, not to members of the excepted service such as petitioner.[5] 5 C.F.R. 210.101(b), 330.203(a)(1). Likewise, the appeal rights set forth in Pts. 302, 352, and 353 do not apply to members of the excepted service who claim a violation of a veterans' preference following a separation by RIF from TVA. See, *e.g.*, 5 C.F.R. 302.103 and 302.501 (employees who have suffered a compensable injury); 5 C.F.R. 352.209 (employees who have been transferred to another executive agency); 5 C.F.R. 352.508 (employees who have served under the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424); 5 C.F.R. 353.401 (employees separated or placed on a leave of absence because of military duty). See also 5 C.F.R. 1201.3 (setting forth the jurisdiction of the MSPB).

2. Petitioner also contends (Pet. 5-8) that the MSPB has jurisdiction to hear his claim because, without such

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[5] The fact that the VPA applies to members of the excepted service, such as TVA employees, does not affect those laws and regulations governing the jurisdiction of the MSPB that recognize a distinction between the excepted and competitive services.

review, veterans like petitioner would be unable to enforce the priority employment rights expressly granted to them by Congress. Such a result, petitioner argues, would be contrary to the purpose of the VPA.

Petitioner's argument is undercut by 5 U.S.C. 7701(a), in which Congress specifically limited the MSPB's jurisdiction to actions appealable to the MSPB "under any law, rule, or regulation." Congress did not enact any laws authorizing an appeal to the MSPB of an agency's failure, when rehiring, to honor veterans' employment preferences. Instead, Congress instructed the Office of Personnel Management (OPM) to promulgate regulations "that implement the Congressional policy that preference shall be given to preference eligibles * * * in appointment, reinstatement, reemployment, and retention * * *." 5 U.S.C. 1302(b). Given this broad mandate, OPM clearly had discretion to determine which agency personnel actions should be subject to MSPB review and which should not. OPM exercised that discretion by granting only former members of the competitive service the right to bring to the MSPB a claim challenging an agency's failure to honor reemployment priority rights. 5 C.F.R. 330.202. Although OPM's decision limits the ability of preference eligible members of the excepted service to enforce their reemployment rights, OPM's policy choice cannot be considered contrary to the intent of Congress in light of 5 U.S.C. 7701(a), which delegates to OPM extensive authority to define the MSPB's jurisdiction.

Nor does *United States* v. *Fausto*, 484 U.S. 439 (1988), cited by both petitioner (Pet. 8) and the dissent below (Pet. App. 12a-14a), support the argument that petitioner must be provided a forum to enforce the rights granted to him by the VPA. To the contrary, in *Fausto* the Court rejected a claim by a member of the excepted service that he was entitled to judicial review of an agency's "adverse action"

(see 5 U.S.C. 7512) for which the CSRA did not provide a remedy. The Court held that Congress's failure explicitly to provide employees in the excepted service a right to appeal adverse actions to the MSPB "is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action * * *." 484 U.S. at 448-449. *Fausto,* therefore, supports the court of appeals' resolution of the instant case. Congress's failure to provide, or to instruct OPM to provide, MSPB review of an agency's alleged violation of an excepted service member's reemployment priority rights indicates a congressional judgment to deny such an employee a statutory right to MSPB review.[6]

3. Even if the MSPB had jurisdiction to hear petitioner's claim, the facts of this case make clear that petitioner would not be entitled to relief. Petitioner contends that because he was a preference eligible veteran, he should have been employed ahead of the two nonveterans hired by TVA to fill the cement mason positions that became available after the RIF. But the record shows that both of the nonveterans had been offered positions with TVA by the time petitioner officially notified TVA that he intended to exercise his veterans' preference. Under TVA's personnel policy, such notification is necessary before TVA will honor a veterans' preference. See Gov't C.A. Br. Add. 39, 42. That notification policy is clearly consistent with the VPA, which provides that a veteran is entitled to

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[6] Petitioner was not entirely without a remedy for his alleged injury. Under the applicable TVA collective bargaining agreement, he could have filed a grievance complaining that TVA failed to honor his veterans' preference.

be placed on reemployment lists "on request." 5 U.S.C. 3315. Similarly, the regulations governing such lists in the competitive service require the veteran to complete a detailed application, 5 C.F.R. 330.202(a), and provide that an agency need not place a veteran on the reemployment list until "ten calendar days after receipt of an application or request." 5 C.F.R. 330.202(b). Thus, TVA's decisions to appoint one nonveteran before petitioner asked to exercise his preference and to appoint a second nonveteran only one day after his request did not violate the VPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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